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TENAGA NASIONAL BHD v. KETUA PENGARAH HASIL DALAM NEGERI

HIGH COURT MALAYA, KUALA LUMPUR
NOORIN BADARUDDIN J
[JUDICIAL REVIEW NO: WA-25-205-07-2020]
B 6 MARCH 2022

Abstract – *A taxpayer/company is entitled to claim for reinvestment allowance (RA) when the taxpayer/company has incurred capital expenditure on a factory, plant or machinery for the purposes of a qualifying project. The capital expenditure incurred by the taxpayer/company herein is for the purposes of expansion, modernisation and automation of its existing business of manufacturing electricity. In generating electricity into a form that can be used by a customer, the generation and transformation must be considered to be part of the manufacture and production of electricity. An RA, therefore, can be claimed for projects that involve expansion of the same product.*

ADMINISTRATIVE LAW: *Judicial review – Application for – Application for order of certiorari to quash decision disallowing applicant's reinvestment allowance (RA) claim – Whether applicant's principal activity of generating electricity in business of manufacturing electricity – Whether fell under 'qualifying project' – Whether applicant entitled to RA under Schedule 7A of Income Tax Act 1967 – Whether application ought to be allowed*

REVENUE LAW: *Income tax – Reinvestment allowance (RA) claim – Application for judicial review for order of certiorari to quash decision disallowing applicant's RA claim – Whether applicant's principal activity of generating electricity in business of manufacturing electricity – Whether fell under 'qualifying project' – Whether applicant entitled to RA under Schedule 7A of Income Tax Act 1967 – Whether judicial review application ought to be allowed*

This was the applicant's judicial review application to apply for, *inter alia*, an order for *certiorari* to quash the respondent's decision ('decision') in disallowing the applicant's reinvestment allowance ('RA') claim in the sum of RM1,812,506,384.64. The applicant claimed RA for the year of assessment 2018 ('YA 2018') in its tax return. The respondent issued a letter requesting for the applicant's audited account, tax computation and computation of capital allowance claim. The applicant provided all the documents requested by the respondent. However, the applicant received the respondent's letter informing the applicant that the RA claim for YA 2018 was disallowed. The respondent then issued the notice of additional assessment for additional tax amounting to RM1,812,506,384.64. The applicant filed the present application. The applicant contended that (i) it was in the business of manufacturing electricity; (ii) it did not fall within

para. 7 of Schedule 7A of the Income Tax Act 1967 ('ITA') which laid out specific circumstances whereby a taxpayer could not claim RA and did not fall within the Income Tax (Prescription of Activity Excluded from The Definition of "Manufacturing") Rules 2012; (iii) the law on RA and definition of 'manufacturing' must be read purposively; (iv) definition of manufacturing should not be construed narrowly; and (v) the respondent's internal interpretation of Schedule 7A of the ITA had no force in law. The main thrust of the respondent's contention was that the applicant had made a wrong claim under Schedule 7A of the ITA. Instead, it should have claimed an investment allowance ('IA') under Schedule 7B of the ITA which applies to the service sector, including utility companies like the applicant. The basis for the respondent's main contention was (i) the function of the disputed items claimed by the applicant for the RA under Schedule 7A was not related to manufacturing; (ii) the disputed items do not fall within the definition of manufacturing; (iii) the disputed items were not plant or machinery used for the purposes of a qualifying project; and (iv) the disputed items did not constitute the qualifying project under para. 8(a) of Schedule 7A of the ITA. The main issue to be determined was whether the applicant's principal activity of generating electricity was in the business of manufacturing electricity and fell under 'qualifying project' for the applicant to be entitled for the RA under Schedule 7A of the ITA.

Held (allowing judicial review application):

(1) A taxpayer is entitled to claim for RA when the taxpayer has incurred capital expenditure on a factory, plant or machinery for the purposes of a qualifying project. The applicant herein was a company for the purposes of the ITA and was a Malaysian resident and had been in operations for not less than 36 months. The applicant had incurred a substantial amount of capital expenditure for the generation, transmission and distribution of electricity in Malaysia. The applicant did not claim any of the incentives listed at para. 7 of Schedule 7A of the ITA. (para 22)

(2) Nowhere in para. 7 of Schedule 7A nor in the Income Tax (Prescription of Activity Excluded from the Definition of "Manufacturing") Rules 2012 that states that generating of electricity is excluded from the activity of manufacturing. The applicant could not be said to be merely providing service of generating or supplying electricity. The activity or business of generating electricity is manufacturing. A utility company can also be a manufacturing company. The applicant never described itself as a utility company in their audited finance account. It was the respondent who described the applicant as a utility company. The fact that our electricity bills issued by the applicant is called utility bill by the common usage of language, did not make the applicant as a utility

company *per se*. The respondent had failed to proffer any case law to support its averment that the applicant was not a manufacturing company or to provide any case law to support their averment that companies similar to the applicant was just a service provider. (para 45)

(3) Parliament could not be said to restrict the activity of generating electricity as manufacturing and disqualify for the RA scheme, because if Parliament had intended to exclude such activity, it could have stipulated it in the ITA. In a taxing Act, one has to look merely at what is clearly said. There is no presumption as to tax. Nothing is to be read in, nothing to be implied. One can only look fairly at the language used. It was also important to note the uniqueness of Schedule 7A of the ITA with its purpose as a special incentive provision to enable the growth of the industry in this country, to encourage businesses to plan for modernisation of their businesses and to also increase their production. The purpose for the introduction of Schedule 7A is to encourage businesses to plan for modernisation of their businesses and to increase their production capacity. Schedule 7A of the ITA including what amounts to qualifying project is not to be construed narrowly in the manner in which the respondent did it as it tantamount to defeating the intention of Parliament in granting the RA. (paras 49-52)

(4) The applicant's business comprised of an integral system of manufacturing electricity which, among others, involved power generation. The applicant had invested in the manufacturing infrastructure, such as the power generation plants and substations were state of the art facilities designed to manufacture electric energy that could meet the nations' ever-growing demand for electricity. Being the largest electricity utility in Malaysia, it serves an estimated 9.3 million customers in Peninsular Malaysia and had been powering national development *via* the provision of reliable and efficient electricity. It was therefore clear from the RA claim for the YA 2018, the capital expenditure incurred by the applicant was none other but for the purposes of expansion, modernisation and automation of its existing business of manufacturing electricity. 'Qualifying project' means a project undertaken by a company, in expanding, modernising or automating its existing business in respect of manufacturing of a product or any related product within the same industry or in diversifying its existing business into any related product within the same industry. It was obvious that RA could be claimed for a project that involved expansion of the same product. (paras 53-57)

(5) There was nowhere in the application form for the RA claimed provided by the respondent that stated or required for a new product to be named or identified. In the application form for the RA, under Part B:

Particulars of Project, the applicant had stated that the transmission and distribution projects consisted of 'installation of new lines and substations.' When a taxpayer/company wants to apply for the special incentive relief under the ITA, it is up to the taxpayer/company to choose to claim in accordance with either Schedule 7A or Schedule 7B of the ITA. They were given the option to choose which special incentive relief they would want to opt for by the law. It was not for the respondent to dictate the taxpayer/company which incentive they should apply for. (paras 58 & 63)

(6) In adopting a holistic approach as to the applicant's business as a whole and not in isolation and as to what electrical energy is, whether it is just a commodity or part of manufacture and production, this court was persuaded by the decisions of the Commonwealth countries as this court shared the view that in generating electricity into a form that could be used by a customer, the generation and transformation must be considered to be part of the manufacture and production of electricity. Then, in scrutinising the functions of the disputed items claimed for RA under Schedule 7A as well as the particulars of project stated by the applicant in the RA form, it was of the considered view that the disputed items relate to manufacturing of electrical energy. Premised on the foregoing, this court allowed the judicial review application by the applicant. (paras 64, 65 & 68)

Case(s) referred to:

AGL Victoria Pty Ltd v. Lockwood 2003 VSC 453 ***(refd)***

Board of Councillors, Bhatpara Municipality v. Cesc Ltd and Ors 2007 CAL 186 ***(refd)***

Canada (Deputy Minister of National Revenue, Customs and Excise - M.N.R.) v. Quebec (Hydro-Electric Commission) [1970] SCR 30 ***(refd)***

Canadian Wirevision Ltd v. The Queen (1979) 2 FC 164 ***(refd)***

Director-General Of Inland Revenue v. Kulim Rubber Plantations Ltd [1980] 1 LNS 141 FC ***(refd)***

Government Of Malaysia v. Jasanusa Sdn Bhd [1995] 2 CLJ 701 SC ***(refd)***

Ketua Pengarah Hasil Dalam Negeri v. Marigold Industries (M) Sdn Bhd [2018] MSTC 30-116 ***(refd)***

Ketua Pengarah Hasil Dalam Negeri v. OKA Concrete Industries Sdn Bhd [2015] MSTC 30-091 ***(refd)***

Ketua Pengarah Hasil Dalam Negeri v. Tropiland Sdn Bhd [2013] MSTC 30-054 ***(refd)***

Majlis Perbandaran Seberang Perai v. Tenaga Nasional Bhd [2004] 4 CLJ 389 FC ***(refd)***

Maritime Electric Company, Limited v. Minister of National Revenue 65 DTC 282 ***(refd)***

National Land Finance Co-Operative Society Ltd v. Director General Of Inland Revenue [1993] 4 CLJ 339 SC ***(refd)***

Nuclear Electric PLC v. Bradley (HM Inspector of Taxes) 1 68 TC 670 ***(refd)***

Palm Oil Research And Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd [2004] 2 CLJ 265 FC ***(refd)***

Saujana Hotel Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2011] MSTC 30-022

The King v. Vandeweghe Ltd [1934] SCR 244 ***(refd)***

Legislation referred to:
Finance Act 2009, s. 46(f)
Income Tax Act 1967, ss. 2(1), 133A, Schedule 7A(1) paras 2B, 7, 8(a), 9, Schedule 7B para 9
Local Government Act 1976, s. 2

For the applicant - S Saravana Kumar & Nur Amira Ahmad Azhar; M/s Rosli Dahlan Saravana Partnership
For the respondent - Hazlina Hussain & Ashrina Ramzan Ali; Senior Revenue Counsel & Nordiana Sham & Kwan Huey Shin; Revenue Counsel

Reported by Suhainah Wahiduddin

JUDGMENT

Noorin Badaruddin J:

[1] Enclosure 24 is the applicant's judicial review application to apply for *inter alia* an order for *certiorari* to quash the respondent's decision dated 13 July 2020 ("decision") in disallowing the applicant's reinvestment allowance ("RA") claim in the sum of RM1,812,506,384.64.

Background Facts

[2] The applicant's director's report and financial statements dated 31 December 2018 state the following:

> Principal Activities
>
> **The Group and Company are primarily involved in the business of the generation, transmission, distribution and sales of electricity** and those tabulated in Note 15 to the financial statements, which also includes the details of the subsidiaries of the Group
>
> There have been no significant changes in these activities during the financial year. (emphasis added)

[3] The applicant claimed RA for the year of assessment 2018 ("YA 2018") in its tax return.

[4] On 2 January 2020, the respondent issued a letter requesting for the applicant's audited account, tax computation and computation of capital allowance claim.

[5] On 15 January 2020 the applicant provided all the documents requested by the respondent in their letter dated 2 January 2020.

[6] On 3 July 2020, the applicant received the respondent's letter informing the applicant that the RA claim for YA 2018 is disallowed.

[7] On 13 July 2020, the respondent issued the notice of additional assessment for additional tax amounting to RM1,812,506,384.64.

[8] The applicant then filed the present application on 21 July 2020.

[9] Leave was granted by the High Court on 30 September 2020. It was a contested leave application where the putative respondent objected to the application. Subsequent to the leave being granted by the High Court, the putative respondent lodged an appeal against the granting of the leave but the appeal was withdrawn thereafter. There was a consent order entered between the parties with the following terms:

(a) The Putative Respondent will withdraw its appeal to the Court of Appeal against the High Court's decision in granting leave to commence judicial review against the Respondent's decision to raise the disputed notice of additional assessment and the Respondent agrees to have the subject matter of the dispute to be heard and resolved by way of judicial review;

(b) The Respondent agrees to withdraw its application to stay the substantive hearing before the High Court and the hearing is to proceed expeditiously;

(c) The Putative Respondent agrees not to object to the Applicant's stay applications pending the full and final determination of the Applicant's judicial review application or appeal;

(d) Pursuant to Section 124(3) of the Income Tax Act 1967, the Respondent agrees after having considered the facts and issues in this application to remit immediately all the penalties amounting to RM562,501,981.44 imposed in relation to the disallowance of reinvestment allowance claim for the year of assessment 2018 regardless of the outcome of these proceedings before the Special Commissioners of Income Tax. The Respondent shall issue the notification of reduced assessment for the year of assessment 2018 consequent to the remission of penalties within 30 days from the date of this order;

(e) Subject to further appeal and any order of the High Court, in the event the High Court dismiss the judicial review application by the Applicant upon the completion of the substantive hearing:

(i) the maximum total liability for the year of assessment 2018 shall not exceed the total amount (excluding all penalties) duly stated in the disputed notice of additional assessment and shall be payable to the Respondent only upon the full and final determination of the Applicant's appeal;

(ii) the Applicant will have no further obligations to make any further payment in respect of additional assessment and penalties for years of assessment 2003 to 2006 and years of assessment 2008 to 2012; and

(iii) the Applicant is not entitled to claim reinvestment allowance under Schedule 7A of the Income Tax Act 1967 for the YAs 2003 to 2006 and YAs 2008 to 2018

(f) Subject to further appeal and any order of the High Court in the event the High Court makes a favourable ruling in favour of the Applicant:

(i) the Respondent is to refund within 30 days the overpayment of taxes by the Applicant amounting to RM1,765,147,183.06 as a result of not claiming reinvestment allowance in the YAs 2003 to 2006 and the YAs 2008 to 2012 by way of a set off against any present and/or future taxes payable by the Applicant upon the full and final determination of Respondent's appeal;

(ii) for the avoidance of doubt, the Applicant will have no further obligations to make any further payment in respect of the additional assessment and penalties for the YAs 2003 to 2006 and YAs 2008 to 2018; and

(iii) the Applicant is entitled to claim reinvestment allowance under Schedule 7A of the Income Tax Act 1967 for the YAs 2003 to 2006 and YAs 2008 to 2018

[10] The consent order is dated 21 January 2021.

Summary Of The Applicant's Contentions

[11] Summarily, the applicant contends that:

(i) it is in the business of manufacturing electricity;

(ii) it does not fall within para. 7 of Schedule 7A of the Income Tax Act 1967 ("ITA") which lays out specific circumstances whereby a taxpayer cannot claim RA and does not fall within the Income Tax (Prescription of Activity Excluded from the Definition of "Manufacturing") Rules 2012;

(iii) dictionary meaning of manufacturing should apply;

(iv) the law on RA and definition of "manufacturing" must be read purposively;

(v) definition of manufacturing should not be construed narrowly; and

(vi) the respondent's internal interpretation of Schedule 7A ITA has no force in law.

Summary Of The Respondent's Contentions

[12] The main thrust of the respondent's contention is that the applicant had made a wrong claim under Schedule 7A of the ITA. Instead, it should have claimed an investment allowance ("IA") under Schedule 7B of the ITA which applies to the service sector, including utility companies like the applicant. The basis for the respondent's main contention is as follows:

(i) the function of the disputed items claimed by the applicant for the RA under Schedule 7A is not related to manufacturing;

(ii) the disputed items do not fall within the definition of manufacturing;

(iii) the disputed items are not plant or machinery used for the purposes of a qualifying project; and

(iv) the disputed items do not constitute the qualifying project under para. 8(a) of Schedule 7A ITA.

Findings

[13] Foremost, the main issue to be determined in this instant matter is whether the applicant's principal activity of generating electricity is in the business of manufacturing electricity and falls under "qualifying project" for the applicant to be entitled for the RA under Schedule 7A of the ITA.

[14] Section 133A of the ITA provides for special incentive relief to a company which shall be given in accordance with Schedule 7A and Schedule 7B. Section 133A ITA states:

> Special incentive relief
>
> 133A. Notwithstanding any other provisions of this Act, special incentive relief shall be given in accordance with Schedule 7A and Schedule 7B.

[15] Schedule 7A(1) of the ITA provides:

> Reinvestment Allowance
>
> 1. Subject to this Schedule, where a company which is resident in Malaysia:
>
> (a) has been in operation for not less than thirty-six months; and
>
> (b) has incurred in the basis period for a year of assessment capital expenditure on a factory, plant or machinery used in Malaysia for the purposes of a qualifying project referred to under subparagraph 8(a);
>
> (c) (Deleted by Act 591),
>
> there shall be given to the company for that year of assessment a reinvestment allowance of an amount equal to sixty per cent of that expenditure:
>
> Provided that such expenditure shall not include capital expenditure incurred on plant or machinery which is provided wholly or partly for the use of a director; or an individual who is a member of the management, or administrative or clerical staff.

[16] The RA was introduced when Parliament passed the Income Tax (Amendment) Act 1979 (A451) on 1 March 1979 and based on the "Penyata Rasmi Parlimen" Hansard dated 13 December 1978, RA was introduced into

A the ITA to encourage companies to have a modernisation plan to increase the production of the company. The High Court in *Ketua Pengarah Hasil Dalam Negeri v. Marigold Industries (M) Sdn Bhd* [2018] MSTC 30-116 had stated:

> Based on s. 17A of the Interpretation Acts 1948 and 1967 and the Federal Court's judgment in *Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd* (2005) MSTC 4, 098; [2004] 2 CLJ 265, s. 133A, paras. 1 and 8(a) of Sch 7A should be given purposive interpretation. *The purpose of s. 133A, read with paras. 1 and 8(a) of Sch 7A, was to provide a "special incentive relief" to companies resident in Malaysia which had been in operation for not less than 12 months, to invest in the expansion modernization or automation of their product manufacturing or processing.*
>
> (emphasis added)

[17] In order for a company to be entitled to claim RA, it must fulfil all the criteria of "qualifying project" under para. 8(a) of Schedule 7A of the ITA which states:

> 8. In this Schedule, "qualifying project" means:
>
> (a) a project undertaken by a company, in expanding, modernizing or automating its existing business in respect of manufacturing of a product or any related product within the same industry or in diversifying its existing business into any related product within the same industry;

[18] Paragraph 9 of Schedule 7A defines the following:

> "manufacturing" means:
>
> (a) conversion by manual or mechanical means of organic or inorganic materials into a new product by changing the composition, nature or quality of such materials;
>
> (b) assembly of parts into a piece of machinery or products; or
>
> (c) mixing of materials by a chemical reaction process including biochemical process that changes the structure of a molecule by the breaking of the intra molecular bonds or by altering the spatial arrangement of atom in the molecule, but does not include:
>
> (aa) the installation of machinery or equipment for the purpose of construction;
>
> (bb) simple packaging operations such as bottling, placing in boxes, bags and cases;
>
> (cc) a simple fixing;
>
> (dd) a simple mixing of any products;
>
> (ee) a simple assembly of parts;

(ff) any activity to ensure the preservation of products in good condition during transportation and storage;

(gg) any activity to facilitate shipment and transportation;

(hh) any activity of packaging or presenting goods for sale; or

(ii) any activity that may be prescribed by the Minister, notwithstanding the above interpretation;

"machinery" means a device or apparatus consisting of fixed and moving parts that work together to perform function in respect of a manufacturing activity, which is directly used in carrying out that activity in a factory;

"modernising" means an upgrading of manufacturing equipment and process;

"operation" means an activity which consists of the carrying on of a business referred to in paragraph 8;

"plant" means an apparatus used in respect of a manufacturing activity, which is directly used in carrying out that activity in a factory;

"simple" generally describes an activity which does not need special skills, special machines, special apparatus or special equipment especially produced or installed for carrying out that activity.

[19] Schedule 7B ITA provides for "investment allowance for service sector". It states as follows:

1. Where a company which is resident in Malaysia for the basis year for a year of assessment has incurred in the basis period for that year of assessment capital expenditure for the purpose of an approved service project, there shall be given to the company for that year of assessment an investment allowance of an amount approved by the Minister, such allowance being not less than sixty per cent of that expenditure.

[20] For the purpose of Schedule 7B ITA, para. 9 of the Schedule defines "approved service project" to mean "a project in the service sector in relation to transportation, communications, utilities or any other sub-sector as approved by the Minister".

[21] It is therefore apparent that a taxpayer is entitled to claim for RA when the taxpayer has incurred capital expenditure on a factory, plant or machinery for the purposes of a qualifying project.

[22] In the instant matter, there is no dispute that:

(i) the applicant is a company for the purposes of the ITA (see the wide meaning to the word "company" under s. 2(1) of the ITA);

(ii) the applicant is a Malaysian resident and has been in operation for not less than 36 months;

(iii) the applicant had incurred a substantial amount of capital expenditure for the generation, transmission and distribution of electricity in Malaysia; and

(iv) the applicant did not claim any of the incentives listed at para. 7 of Schedule 7A of the ITA.

[23] It is important to note that the applicant first claimed RA in the YA 2003 and was originally entitled to claim for RA for 15 years. Consequent to para. 2B of Schedule 7A of the ITA, the applicant is entitled to claim RA until and for the YA 2018. Paragraph 2B of Schedule 7A ITA states:

> 2B. Subject to this Schedule and notwithstanding paragraph 2, where a company has first made a claim for an allowance under this Schedule in the return of its income and the period for fifteen consecutive years of assessment referred to in paragraph 2:
>
> (a) ended in the year of assessment 2015 or in any other preceding year of assessment, an allowance under paragraph 1 or 1A shall be given in respect of capital expenditure incurred by the company in the basis period for the years of assessment 2016, 2017 and 2018;
>
> (b) ends in the year of assessment 2016, an allowance under paragraph 1 or 1A shall be given in respect of capital expenditure incurred by the company in the basis period for the years of assessment 2017 and 2018; or
>
> (c) ends in the year of assessment 2017, an allowance under paragraph 1 or 1A shall be given in respect of capital expenditure incurred by the company in the basis period for the year of assessment 2018.

[24] The respondent's basis for rejecting the applicant's RA claim is that the applicant is not in the business of manufacturing electricity. The respondent contends that the applicant is a service provider and thus the applicant should instead claim IA under Schedule 7B of the ITA.

[25] It is important to understand what electricity is in the first place. The Federal Court had dealt with the issue in the case of *Majlis Perbandaran Seberang Perai v. Tenaga Nasional Bhd* [2004] 4 CLJ 389; [2005] 1 MLJ 1 ("*Seberang Perai*"). *Seberang Perai* is a case under the Local Government Act 1976 ("LGA") where the appeal to the Federal Court was in respect of such part of the judgment of the High Court that decides that:

(i) electricity is an article for the purposes of determining the annual value in accordance with the definition of 'annual value' in s. 2 of the LGA;

(ii) all machinery for the production of electricity as an article at the Seberang Prai Power Station including steam engines, boilers or other motive power to such machinery, is to be excluded from the computation of the annual value; and

(iii) the notice of assessment dated 11 November 1995 and the decision of the Rating Appeal Committee given on 3 October 1996 be set aside. A

[26] The Federal Court in that case held as follows:

[9] It is to be noted that the Electricity Supply (Amendment) Act 2001 came into force on 2 January 2002. It seems clear from the undisputed facts of this case, taking into consideration of the coming into force of the LGA (*ie* 1 January 1977), the Electricity Supply (Amendment) Act (*ie* 2 January 2002) and the relevant date of revaluation of the SJSP for the period 1 January 1990, the definition of 'electricity' as an article under the Electricity Supply Act 1990 remain intact and applicable. It reads: B

> 'electricity', unless otherwise defined, is an article as provided for under section 3 of the Factories and Machinery Act 1967. C

[10] Under s. 3 of the Factories and Machinery Act 1967, 'article' means any solid, liquid or gas or any combination thereof, and also includes electricity.

[11] in the circumstances, on the facts of this case and the laws applicable at the material time, 'article' referred to in the proviso (b) to the definition of 'annual value' of the LGA can and should be construed as including 'electricity'. D

[12] Quite apart from the reference to the relevant legislation on the meaning to be assigned to 'article' in s. 2 of the LGA as set out above, the learned judge in ruling that 'electricity' is an article stated at p. 10 of his judgment: E

> The sole use of the holding by the Applicant is to generate, or in other words, to produce electricity, for sale. Electricity is a form of energy. It has no physical form to make it identifiable as an object or for that matter an article in the normal sense. But energy, or more specifically, electricity in this case, in the context of the business activity of the Applicant, is nevertheless a product. In that sense as a product, electricity is in my view no less an article than say, air. In *Granada TV Network Ltd v Kerridge (Valuation Officer), Knight's Local Government and Magisterial Reports* Vol LX1 p 332, 1963, Lord Denning MR said at p 334: F G
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> > ... I can well see that water is an article, at any rate when it is confined in a pipe, but I doubt whether water is an article when it is flowing in a river. I can understand that gas is an article when it is confined in a container, but I should doubt whether gas escaping into a room was an article ... H
>
> The electricity generated by the Applicant on the holding is not released at large as various forms of radiant and electrical energy in nature, but is confined along cables and delivered to consumers, large and small. In that sense it is in my view an 'article' that is made by the Applicant on the holding. The LGA after all is legislation dealing with local authorities and its use of the term I

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> 'article' is a wide and general description of the work activities on holdings within a local authorities' area and cannot be expected to provide an exhaustive and detailed description of each of all of the products of the diverse production activities found in this day and age.

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> [13] We agree with the learned judge's ruling and for the reasons stated by us, our answer to question (a) is in the affirmative.
>
> ...
>
> [18] Learned counsel for the respondent further submitted that the Factories and Machinery Act 1967 would be the most relevant legislation in relation to 'machinery and production therefrom' within the context of proviso (b) in the definition of 'annual value' in s. 2 of the LGA in respect of the word 'article' in items (i), (ii) and (iii). It is the governing legislation and the licensing authority for ail production machinery in the country as opposed to the Electricity Supply Act 1990 and the Energy Commission Act 2001 dealing specifically with the generation, distribution and supply of energy. We agree that the object of the Factories and Machinery Act 1967 is definitely different to that of the Electricity Supply Act 1990 and the Energy Commission Act 2001 in so far as it is the governing legislation and the licensing authority for all machinery in the country, it is clear to us that the use of the machinery in the operation of the power station is subject to the regulatory powers of the Factories and Machinery Act 1967 and machinery installed in the power station is subject to licensing under it without which it would be unlawful to operate such machinery. *In other words, the power station for all intent and purpose can be considered as a factory for the production of an article, that is, electricity just like any other manufacturing plants or factories that manufacture goods or articles. The article, that is, electricity is for sale to the consumers, large and small and therefore the respondent to that extent is involved in commercial/business activity peculiar in its own way.* (emphasis added)

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[27] It can further be seen that the Federal Court in that case had looked into two tax cases; *Canadian Wirevision Ltd v. The Queen* (1979) 2 FC 164 and *AGL Victoria Pty Ltd v. Lockwood* from the Supreme Court of Victoria-Commercial and Equity Division 2003 VSC 453 (Victoria Unreported Judgments). The Federal Court dealt and found as follows:

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> [19] Learned counsel for the respondent cited two cases, one from the Federal Court of Canada, Court of Appeal, Vancouver, that is, *Canadian Wirevision Ltd v. The Queen* (1979) 2 FC 164 and the other from the Supreme Court of *Victoria-Commercial and Equity Division* 2003 VSC 453 (Victorian Unreported Judgments) is *AGL Victoria Pty Ltd v. Lockwood.*
>
> [20] *In respect of Canadian Wirevision Ltd, the case no doubt is in respect of an income tax matter.* The headnote reads:

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> This is an appeal from a judgment of the Trial Division dismissing appellant's appeal from its income tax assessment for the 1974 taxation year and holding in effect that the appellant was not, during that year, involved in the manufacturing or processing of goods so as to be entitled to the tax reduction provided for in section 125.1 of the Income Tax Act. The appellant is a cablevision company. The Trial Judge rejected its contention that radio and television signals received by the appellant and transmitted to subscribers' receiver sets by coaxial cable, were 'goods' sold to its customers in the normal operation of its business.
>
> Held, the appeal is dismissed. The word 'goods' in section 125.1 'is used in the common parlance of merchandise or wares, or to put it in legal jargon, tangible moveable property'. In that sense, the signals captured by the appellant are not goods. Further, the appellant would not succeed even if that conclusion were wrong because the record does not show that it ever sold signals to its subscribers. Whatever be the technology of cablevision, the only realistic view of the appellant's activities is that of a mere carrier providing its subscribers with the technical means of obtaining a better reception of radio and television signals. The appellant is in the communication business, it is not in business of selling goods.

[21] Pratte J in the judgment at p. 32 concluded:

> ... the signals captured by the appellant, in my view, are not goods. True, electricity is often referred to as a commodity and even, sometimes as 'goods'. However, the electricity that is commonly purchased and sold and referred to as an article of trade is the electricity that is produced, sold and used for its energetic properties. By contrast, radio and television signals, while electrical currents, are never referred to as 'goods'.

[22] The *obiter* of Pratte J would appear to support the definition of 'electricity' which excepted the transmission of any communication or signal.

[23] The case of *AGL Victoria Pty Ltd v. Lockwood* (Supreme Court of Victoria) relates to the meaning of 'electricity' supplied to a company under receivership. One of the issues before the court was whether electricity and electrical power goods can be regarded as purchase under s. 419(1) of the Corporations Act. The Supreme Court of Victoria in *AGL Victoria Pty Ltd* quoted with approval the decision of the Federal Court in *State of Electricity Commission of Victoria (SECV) v. Federal Commissioner of Taxation* (Carr J dissented on factual aspect of this passage) in which SECV sought a declaration that certain transformers used in electricity distribution were exempt from sales tax. Upon appeal to the Full Federal Court counsel for the commissioner conceded before the court that electricity and electrical power were goods as defined in the sales tax legislation of that country. The majority said this:

A (1) ... Clearly electrical power is something subject to the dominion of United. It can be transported from place to place. It can be bought and sold ...

(2) ... Energy is a function of power over time. That is the 'commodity of commerce' which is bought and sold. The B commodity is electrical energy, rather than electric current having a particular voltage. On this view, a change in current or voltage does not result in the manufacture or production of a different commodity or different goods.

(3) ... electrical energy can be bought and sold, as such, in a C quantifiable amount or by the piece. A consumer purchases and consumes energy by turning on a switch and subsequently turning it off.

[24] *Though the facts and the legislations in the two cases cited above may be different but the common issue is that electricity or electrical energy has been held as goods which bear the same meaning as articles and would lend support to the interpretation* D *of 'electricity' as an article in the context used in the LGA.*

(emphasis added)

[28] Although the *Seberang Perai* case does not involve tax matters but the Federal Court had looked into two cases involving tax matters and had agreed that electricity is an article or goods in the context of the LGA. It is E also clear that the Federal Court in that case recognised that electricity is an article under the Factories and Machinery Act 1967 and that the respondent in that case who is the applicant in the present matter is involved in the business of manufacturing electricity. Those parts of the judgment quoted in the above in the *Seberang Perai* case formed the *ratio* of the Federal Court's F decision. It is not an *ipsie dixit* or passing remarks by the Federal Court as contended by the respondent.

[29] This court's attention is further brought to cases from the Commonwealth countries in support of the contention that the applicant is in the business of manufacturing electricity.

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[30] In the United Kingdom, the case of *Nuclear Electric PLC v. Bradley (H.M. Inspector of Taxes)* 1 68 TC 670 which is a tax case, the appellant carried on the business of the production of electricity from nuclear fuel. The issue in the appeal was whether interest income would fail to be taken into account as a trading receipt in computing the company's trading income but for the H fact that the income has been subjected to tax under another provision of the Income and Corporation Taxes Act 1988. What is important in this case is that in the course of delivering the decision, the Court of Appeal had analysed the business of the taxpayer and acknowledged the act of manufacturing electricity from the nuclear energy as follows:

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> **The costs involved in the process of manufacturing electricity** from nuclear fuel can be conveniently divided into three components. The first comprises the costs of mining and processing uranium and its delivery to the reactor ("the front-end costs"); the second comprises the costs of attributable to the period (normally five years) between the time that the uranium is loaded into the reactor until it is removed, and the third comprises the costs of storing and reprocessing the fuel for reuse and the treatment and disposal of radioactive waste ("the back-end costs").
>
> (emphasis added)

[31] It could be gleaned from the above case that the courts in the United Kingdom look at the activity of generating and supply of electricity as manufacturing activity. Although in the instant matter the electricity is not generated from nuclear fuel but instead through hydro power, the business of the production of electricity cannot be any different anywhere in the world. It involves generating, transmission and distribution of electricity.

[32] Next is the position in Canada. In a tax matter as well, in *Canada (Deputy Minister of National Revenue, Customs and Excise - M.N.R.) v. Quebec (Hydro-Electric Commission)* [1970] SCR 30, ("*Quebec Hydro-Electric*") the appellant company whose principal business is production of electricity for sale to its customers, contends that the transformers it uses in that connection are "machinery and apparatus sold to or imported by manufacturers or producers for use by them directly in the manufacture or production of goods" within the meaning of para. (a) of Schedule V of the Excise Tax Act, R.S.C. 1952, c.100, and such are subject to the lower rate of sales tax imposed by s. 32(3) of the Act. The Tariff Board agreed with that contention, but its declaration was set aside by the Exchequer Court. The Commission appealed to the Supreme Court. The Supreme Court by majority (consisting of six judges) held that:

> *The electrical energy produced by the applicant is not a commodity which is ordinarily used by or sold to its customers until it has been transformed; it exists, prior to such transformation, in a form which is not generally marketable because it is unsuited for the use of most customers.*
>
> *Because it is the transformation in issue that turns the electrical energy into a form that can be used by the customer, this transformation must be considered to be part of the manufacture and production of electricity.*
>
> Because the transformation of voltage is done exclusively in the transformers and by the transformers, they are apparatus sold to or imported by the applicant for use by it directly in the manufacture or production of goods. (emphasis added)

[33] Again, it can be seen that the court recognised that electricity is a manufacturing activity and the electricity being manufactured is considered as goods. In *Quebec Hydro-Electric* again, the Supreme Court cited a case of *The King v. Vandeweghe Ltd* [1934] SCR 244, [1934] 3 DLR 57 where Duff CJ had discussed the words 'manufacture' and 'production'. The court stated:

A As Duff CJ stated in *The King v. Vandeweghe Limited*: "The words 'manufacture' and 'production' are not words of any precise meaning and, consequently, we must look to the context for the purpose of ascertaining their meaning and application in the provisions we have to construe." Nevertheless, taking these words in their natural and ordinary sense, there is nothing in the Excise Tax Act which would compel such a
B restrictive meaning as that contended for by the respondent.

[34] In *Maritime Electric Company, Limited v. Minister of National Revenue* 65 DTC 282, the appellant company carried on the business of generating, transforming, transmitting and distributing electrical energy in Charlottetown, Prince Edward Island and also of purchasing electrical
C energy in New Brunswick and thereafter transforming and distributing it in Fredericton. In its 1962 return the company claimed a tax credit of $8,627 under the provisions of s. 40A, which was enacted in 1962 to encourage increased production through an incentive to increase sales (The section has since been repealed). The Minister refused to grant the credit. He did not
D question the company's computation of the amount of the credit but ruled that the company was not a 'manufacturing and processing corporation' as defined in s. 40A(2). He maintained that electricity could not be classified under the heading of 'goods processed or manufactured'.

[35] The Tax Appeal Board of Canada in allowing the appeal held as
E follows:

> The appeal was allowed. The appellant company was entitled, under section 40A, to a credit of $8,627 on its 1962 income tax. *The company's business should be generally characterized as manufacturing and the electrical energy produced in the company's manufacturing operations should be characterized as*
F *'goods' for the purpose of the Income Tax Act.* In reaching these conclusions, the Board made a detailed study of the nature of electricity, examined dictionary definitions and judicial authorities, considered the use of the word 'goods' in the Excise Tax Act, and made the following findings: *(1) Electricity is completely unique. It is tangible, ie, perceptible to the touch. It does*
G *not occur in nature in any form that can be directly harnessed and can only be produced for general use by machines devised by man's ingenuity. An electrical generating company produces and, in effect, manufactures electrical energy which it sells commercially as a thing of use or advantage to mankind, that is as a commodity. Such a commodity should be treated as being included in the word 'goods'. Electrical energy could be classified as 'goods processed or manufactured'. (2)*
H *it was clear that Parliament in enacting the Excise Tax Act was quite satisfied to regard a corporation whose principal business was the generation of electricity as manufacturing electricity and to regard electricity as coming within the term 'goods'.* One would think that ordinary words like 'goods' and 'manufacturing' would mean the same thing in two revenue-producing statutes administered by the same department. *(3) The appellant company was at all*
I *relevant times a 'manufacturing and processing corporation'.* It was not necessary to make any distinction between the company's operations in Prince

Edward island as a primary producer of electrical energy and its operations in New Brunswick. In purchasing, transforming and distributing electric power in that province, it was a processing corporation.

(emphasis added)

[36] It is pertinent to highlight that in *Maritime Electric Company, Limited* (*supra*), the Tax Appeal Board had explained electricity is manufactured as follows:

Electrical energy manufactured

From the material set out above, it is clear that electricity or electric energy is produced in a conductor when it cuts across magnetic lines of force or flux, in the process of induction the flow of the electrons in the conductor is caused by the effect of the magnetic lines of force on the individual atoms of the conductor. There is no suggestion, so far as I have been able to discover, that the lines of force created by the magnetic field are themselves introduced into the conductor. Thus, the electrical output of a modern generator is produced by the action of the rotating part of the generator (ie, the rotor) in providing the flux or magnetic lines of force which initiate the flow of the electrons or electrical energy in the conductor (ie, the part of the generator known as the stator). The electrical energy so generated or produced in the generator is then taken off in three heavy copper busbars to a switch or other control device. From there it is conducted to a power transformer for transformation in accordance with the plan of transmission and distribution of the particular electrical distribution system involved. So, it would appear to be absolutely correct to say that electricity is produced by machines skilfully constructed under the direction of highly-trained electrical and mechanical engineers who have designed the machines to take advantage of the principles of magnetism and induction found to exist in nature. Therefore, in the result, an electrical generating company produces, and, in effect, manufactures electrical energy which it sells domestically and commercially as a thing of use or advantage to mankind, which is just another way of saying – 'as a commodity'. The relationship between the word 'commodity' and the word 'goods' will be the subject of some discussion later in these reasons.

(emphasis added)

[37] Similar aspects with what the applicant herein are doing in its business was discussed by the Tax Appeal Board in *Maritime Electric Company, Limited* in particular where transmission and distribution of electrical energy are involved. The Trade Board stated further:

In interpreting the language used in a statute, the words should be given, of course, their plain meaning, but it sometimes happens that the scope of a particular word has not previously been defined for all purposes. Two of such words are 'manufacturing' and 'goods', and in the foregoing observations and reasons I have endeavoured to explain why the generation, transformation, transmission and distribution of electrical energy should be regarded as manufacturing, and why the product of such manufacturing, namely, the commodity electrical energy, should be treated as being included in the word 'goods'. While pondering the scope of the word 'goods', I could not help but think of the following quotation from Lewis Carroll's *Alice Through the Looking-Glass*:

A 'When I use a word', Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean – neither more nor loss'. 'The question is', said Alice, 'whether you can make words mean so many different things'. 'The question is', said Humpty Dumpty, 'which is to be master – that's all'.

B *In view of the foregoing, there should be a finding that the business of Maritime Electric, in generating, transforming, transmitting and distributing electrical energy in Charlottetown, Prince Edward Island, and in purchasing electrical energy in New Brunswick and thereafter transforming and distributing it in the City of Fredericton, should be generally characterized as manufacturing, and a further finding that the electrical energy produced in the above-mentioned manufacturing operations should*
C *be characterized as 'goods' for the purposes of the Income Tax Act.*

(emphasis added)

[38] The Canadian cases are highly persuasive as this court finds that the facts in those cases are to a large extent on all fours with the facts in the instant case. The explanation elucidated by the courts as to how electricity
D is generated gives a clear illustration that the process of generating electricity is akin to manufacture or production of an article or goods or things.

[39] This court is further taken to the position in India where the courts were of the considered view that generating, transforming and distribution is part of manufacturing process of electricity.

E

[40] In *Board of Councillors, Bhatpara Municipality v. Cesc Ltd and Ors* 2007 CAL 186, the High Court in Calcutta, India had stated:

40. Therefore, the Court would not make any alteration which is contrary to legislative intent and after construing all the sections of the said Acts,
F we have to come to the conclusion that the generation of electricity is the beginning of the process and it culminates upon transmission of power to the customers, that is the reason for giving the definition by legislators under Section 2(k)(i) of the Factories Act, 1948.

41. In this circumstance, we have to come to the conclusion that setting up of a 'switching-cum-substation' is clearly for industrial use within the
G meaning of the 1979 Act.

42. Accordingly, we conclude that "generating, transforming and distributing" is nothing but a part of "manufacturing process" of electricity and thereby 'switching-cum-substation' has to be treated as industrial use. (emphasis added)

H **[41]** In *Ntpc Ltd, New Delhi v. Assessee ITA No.1438/Del/2009* (https://indiankanoon.org/doc/69527981/), the Indian Income Tax Appellate Tribunal had held that the generation of electricity is akin to manufacturing and stated the followings:

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> ... if we evaluate the conclusion drawn by the Learned Commissioner in the light of the decision of the Hon'ble Supreme Court given in the case of *Indian Cine Agency, CST Vs. M.P. Electricity Board* and *State of Madhya Pradesh Vs. NTPC* then it would suggest that electric energy has all trapping of an article or goods. *The process of its generation is also akin to manufacture or production of an article or thing. It is being generated in huge plants though scientifically one may say it is transformation of one source of energy into the other.* (emphasis added)

[42] The authorities from the Commonwealth countries cannot be dismissed outrightly unless we have our own authorities and the facts therein can be distinguished with our case such as in the present matter. It is obvious that the Commonwealth cases cited in the above involve similar if not the same issues *ie*, the production of electricity which cannot be different from the instant matter. In *Director-General Of Inland Revenue v. Kulim Rubber Plantations Ltd* [1980] 1 LNS 141; [1981] 1 MLJ 214, the Federal Court in holding that the decisions of the Commonwealth courts are persuasive stated the followings:

> *Insofar as the decisions of other courts in these and other countries are concerned, we have always treated these judgments as of only persuasive authority, but we have never lightly treated them or refused to follow them, unless we can successfully distinguish them or hold them as per incuriam.* Other than for these reasons, we should as a matter of judicial comity and for the orderly development of law, pay due and proper attention to them. In this light we now propose to consider whether the relevant statutory provisions are similar and go on to consider the decisions in the Australian and New Zealand Courts and the Courts in the United Kingdom which have been canvassed before us and some others. (emphasis added)

[43] Turning on to the provision of the ITA specifically to Schedule 7A which prescribes for RA, Parliament in its wisdom has laid down specific circumstances where a taxpayer cannot claim for RA. This can be seen in para. 7 of Schedule 7A which states:

> 7. This Schedule shall not apply to a company:
>
> (a) for the basis period during which the company:
>
> (i) has been granted pioneer status under the Promotion of Investments Act 1986 in respect of a promoted activity or promoted product and which is applying or intends to apply for the grant of a pioneer certificate; or
>
> (ii) has been granted pioneer certificate under the Promotion of Investments Act 1986 in respect of a promoted activity or promoted product and whose tax relief period has not ended or ceased;
>
> (b) for the basis period for which the company has been granted approval for investment tax allowance under the Promotion of Investments Act 1986 in respect of a promoted activity or promoted product for the period prescribed under the relevant provisions of that Act;

(c) (Deleted by Act 578);

(d) for the basis period during which that company, notwithstanding the repeal of the Investment Incentives Act 1968:

(i) has been given approval under section 5, 12A or 12B of that Act and whose tax relief period has not ended; or

(ii) has been given approval under section 26 of that Act and incurs capital expenditure which qualifies for investment tax credit; or

(e) for the basis period for which the company has been granted approval under section 31C of the Promotion of Investments Act 1986 prior to the coming into operation of section 37 of the Promotion of Investments (Amendment) Act 2007 [Act A1318] in respect of a manufacturing activity or manufactured product for the period prescribed under paragraph 31E(2)(b) of that Act;

(f) (Deleted by Act 683).

[44] The Minister has also issued the Income Tax (Prescription of Activity Excluded from the Definition of "Manufacturing") Rules 2012 ("Rules 2012") wherein under Schedule 2 rr. 2, 20 activities are listed to be excluded as manufacturing. They are:

1. Ice making
2. Cutting, sorting, cleaning, drying, grinding, mixing, grading or packaging herbs or spice, or any of its combination
3. Production of aggregates, asphaltic concrete, pre-mix cement, ready mixed concrete or bitumen, or any of its combination
4. Folding and shaping paper box, cardboard, plastic bag, envelopes or any other folding and shaping activity
5. Laminating
6. Quarrying
7. Mining or extraction of mineral
8. Processing of photograph, picture, slide or film, or any of its combination
9. Baking except where the activity is carried out in a factory
10. Distillation or filtration of water
11. Treatment of waste water and solid waste
12. Mixing or blending of petroleum product
13. Cleaning, processing, packing or freezing of product, or any of its combination

14. Painting, polishing or varnishing, or any of its combination
15. Colouring, stamping or printing of logo on materials or clothing, or any of its combination
16. Production of herb or traditional medicine, or any of its combination
17. Production of sawn timber, veneer or plywood including drying of the product, or any of its combination
18. Photostatting
19. Recycling activity which involves sorting, cutting or packaging, or any of its combination
20. Ship building activity.

[45] It is clear that nowhere in para. 7 of Schedule 7A nor in the Rules 2012 that state generating of electricity is excluded from the activity of manufacturing. Interestingly, the learned Senior Revenue Counsel for the respondent argued that the activity of generating of electricity need not be listed as being excluded from the activity of manufacturing because, in the first place, the applicant's activity of generating electricity does not come within the meaning of manufacturing since the electricity is only being transmitted and sold by the applicant. It is also argued that the applicant falls within what is being envisaged by Parliament under the service sector and specific provision of Schedule 7B of the ITA was enacted to provide IA for the said service sector with its criteria.

[46] However, this court disagrees with the respondent's learned Senior Revenue Counsel's contention. Firstly, and as alluded to in the above, the applicant cannot be said to be merely providing service of generating or supplying electricity. The cases from the Commonwealth countries which are tax cases and where the business activity of the taxpayer company therein is similar to the applicant herein, clearly illustrate that the activity or business of generating electricity is manufacturing. There is no legal or factual basis for the respondent to state that the applicant is a company that provides services. A utility company can also be a manufacturing company, in fact, the applicant never described itself as a utility company in their audited finance account. It is the respondent who describes the applicant as a utility company. The fact that our electricity bills issued by the applicant is called utility bill by the common usage of language, does not make the applicant as a utility company *per se*. The respondent has failed to proffer any case law to support its averment that the applicant is not a manufacturing company or to provide any case law to support their averment that companies similar to the applicant is just a service provider.

[47] Definition and how electricity is produced from internet sources have no legal value and binding. Not even persuasive. As stated earlier, the Federal Court in the *Seberang Perai* case clearly establishes that the applicant is in the business of manufacturing electricity.

[48] Secondly, Parliament cannot be said to restrict the activity of generating electricity as manufacturing and disqualify for the RA scheme, because if Parliament had intended to exclude such activity it could have stipulate it in the ITA. In *Ketua Pengarah Hasil Dalam Negeri v. OKA Concrete Industries Sdn Bhd* [2015] MSTC 30-091, the High Court had held:

> **If Parliament had intended reinvestment allowance to be restricted only to "production area", then Parliament would have surely specified this clearly in Schedule 7A.** In United Kingdom, the United Kingdom tax authority's attempt to impose an additional condition in determining the taxpayer's eligibility for industrial building allowance was rejected by the House of Lords in *Saxone Lilley & Skinner (Holdings) Ltd v. Commissioner of Inland Revenue* [1967] 44 TC 122. Lord Reid commented that:
>
> > The Crown's main argument was that 'in use for the purpose of a trade' or part of a trade means wholly or mainly use for such purposes. But that involves writing in words which are not there, and I can see nothing in the context to make that necessary. Moreover, it requires no feat of imagination in a draftsman to see that cases may arise where the same building or the same part of it is being used for two purposes, and if it were intended to exclude such cases I would expect that he made clear ... (emphasis added)

[49] This court is reminded that in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used (Supreme Court in *National Land Finance Co-operative Society Ltd v. Director General Of Inland Revenue* [1993] 4 CLJ 339).

[50] Likewise, the Minister for that matter could have exclude the activity of generating electricity as manufacturing in the very specific list of excluded activities in the Rules 2012. In fact, the Minister can include the activity of generating electricity in the list since the applicant herein being the major electric supplier of Peninsular Malaysia has already made the RA claim in 2009 whilst the rule was made in 2012, if indeed such activity is intended to be excluded as manufacturing.

[51] It is important to note the uniqueness of Schedule 7A ITA with its purpose as a special incentive provision to enable the growth of the industry in this country, to encourage businesses to plan for modernisation of their businesses and to also increase their production. This can be seen from the Parliamentary Debate on 13 December 1978, where the then Deputy Finance Minister in proposing for the amendment to the ITA to be read for the second time had stated *inter alia* that the purpose for the introduction of Schedule 7A is to encourage businesses to plan for modernisation of their businesses and to increase their production capacity. In the Hansard, the then Deputy Finance Minister stated as follows:

> Di dalam Ucapan Belanjawan 1979, Yang Berhormat Mulia Menteri Kewangan telah juga mengemukakan cadangan untuk *mengadakan galakan bagi perusahaan-perusahaan yang sudah bertapak dalam bentuk elaun pelaburan semula untuk menggalakkan mereka mengadakan rancangan pemodenan serta menambahkan pengeluaran.* Fasal 18 menyediakan suatu jadual baru 7A dalam Akta Cukai Pendapatan, 1967 bagi elaun pelaburan semula itu. Elaun pelaburan semula ialah 25% daripada perbelanjaan modal yang dikenakan kepada suatu kilang, loji atau alat jentera yang digunakan bagi sesuatu projek yang diluluskan. Perbelanjaan itu mestilah dikenakan dalam tempoh 3 tahun dari 1hb Januari, 1979. Pendapatan yang diselaraskan bersamaan dengan jumlah elaun pelaburan semula adalah dikecualikan daripada cukai. Jika ada kerugian, elaun pelaburan semula itu akan dibawa ke hadapan. (emphasis added)

[52] Schedule 7A ITA including what amounts to qualifying project is not to be construed narrowly in the manner in which the respondent does as it tantamount to defeating the intention of Parliament in granting RA. The purposive approach in interpreting tax provisions have been recognised by our courts. The Federal Court in *Palm Oil Research And Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd* [2004] 2 CLJ 265; [2005] 3 MLJ 97 had held:

> It is clear beyond doubt that in view of s. 17A of the Interpretation Acts 1948 and 1967 there is now a statutory recognition for the courts to take purposive approach in the interpretation of statutes including taxing statutes.

[53] The applicant has averred in its supporting affidavit that its business comprises of an integral system of manufacturing electricity which, among others, involves power generation. The applicant highlighted that the manufacturing infrastructure that it has invested in, such as the power generation plants and substations are state of the art facilities designed to manufacture electric energy that could meet the nations' ever-growing demand for electricity. The applicant further avers that being the largest electricity utility in Malaysia, it serves an estimated 9.3 million customers in Peninsular Malaysia and has been powering national development *via* the provision of reliable and efficient electricity. In Peninsular Malaysia the applicant supplies households and industries with electricity manufactured from three thermal stations and three major hydroelectric schemes.

[54] It is therefore clear from the RA claim for the YA 2018, the capital expenditure incurred by the applicant is none other but for the purposes of expansion, modernisation and automation of its existing business of manufacturing electricity. It is not disputed that the installation and reinforcement of existing lines to expand and strengthen transmission of electricity and installation and reinforcement of new lines and substations are to increase the capacity for distribution of electricity.

[55] Looking at the items claimed by the applicant for the RA, such as:

(i) the transmission line which function as a specialise cable or other structure designed to conduct electromagnet waves in a contained manner;

(ii) the transformer which functions as an electrical device that trades voltage for current in a circuit, while not affecting the total electrical power which means it takes high-voltage electricity with a small and changes it into low-voltage electricity with a large current, or *vice versa*;

(iii) the capacitor which functions to store the electrical energy and give this energy to the circuit when necessary. In other words, it charges and discharges the electric charge;

(iv) the switchgear which refers to a centralised collection of circuit breakers, fuses and switches (circuit protection devices) which function to protect control and isolate electrical equipment;

(v) the underground cables/lines used for high/extra high voltage distribution; and

(vi) the distribution lines substation for distributing power from a transmission system to a consumer that operates at less than 69.000 volts

it is not difficult to comprehend that the items relate are not adjunct to the process of manufacturing. The items relate to manufacturing of electrical energy. In the first case of RA, Abang Iskandar Abang Hashim J (as His Lordship then was) in *KPHDN v. Success Electronics & Transformer Manufacture Sdn Bhd* [2012] had held:

> The ITA has defined factory in Schedule 3, but not in Schedule 7A para. 1(b). The learned Special Commissioner had derived great assistance on the meaning to be assigned to that word from a distillation of a number of decisions on cases in which the courts had been faced with the task of deciding what a factory ought to include, rather than failing back on the rather narrow meaning assigned to that word by an ordinary dictionary. *The functionality of the claimed items in the overall context of the production in the manufacturing process in the factory ought to be taken as a valid factor to be considered in giving the appropriate meaning to the word "factory".*
>
> (emphasis added)

[56] The respondent has argued that there must be a new product in order for a taxpayer such as the applicant herein to claim for RA. However, this court finds that is not the requirement prescribed under the law. Paragraphs 7 and 8 Schedule 7A ITA do not state as such. The requirement is only stated in the respondent's public ruling which is not binding on the applicant.

[57] It must be borne in mind that "qualifying project" means a project undertaken by a company, in expanding, modernising or automating its existing business in respect of manufacturing of a product or any related product within the same industry or in diversifying its existing business into any related product within the same industry. It is obvious that RA can be claimed for a project that involves expansion of the same product.

[58] This court further finds that nowhere in the application form for the RA claim provided by the respondent that states or require for a new product to be named or identified. Even if the respondent's contention is right that there must be a new product (to which this court disagrees), it can be clearly seen that in the application form for the RA (exh. "AJMD1" in the respondent's affidavit-in-reply 3), under Part B: Particulars of Project, the applicant has stated that the transmission and distribution projects consist of "installation of new lines and substations". The applicant stated as follows in the said form:

> The transmission project consists of **installation of new lines** and reinforcement of existing lines to facilitate the increase in transmission of electricity to new development areas as well as increasing efficiency and reducing the interruption during transmission of the electricity. **The distribution project consists of installation of new lines and substations** to increase the capacity for distribution of electricity to new areas.
>
> (emphasis added)

[59] In the appendix attached to the application form for RA, it is stated that the applicant had spent RM2.6 billion for the new lines' installation in the transmission and distribution project.

[60] It must also be borne in mind that the respondent's internal interpretation of Schedule 7A of the ITA has no force in law. In *Success Electronics* (*supra*), the High Court had held:

> Regarding the restriction of RA by the Revenue on "production area" only, RW1 admitted during the trial that the Respondent's decision was based on its own internal ruling of the Revenue, or in other words it was based on its own guideline. At the same time, it was noted that the RW1 also admitted that the conditions for "production area" was not contained in Schedule 7A of the Act. Premised on that circumstance, the Special Commissioners were of the view that the imposition of the condition "production area" based on internal ruling or guidelines without any legal authority was therefore not law; and therefore it had no force of law. In other word, the Revenue was not entitled to reduce or to disallow the RA claimed under Schedule 7A of the Act based on its own internal ruling or guidelines.

[61] It must be noted as well that at the time the case of *Seberang Perai* was decided, there was no definition of "manufacturing" in the Local Government Act 1976 ("LGA"). Similarly, in the present matter, at the time

when the applicant first claimed the RA in the YA 2003, the definition of "manufacturing" has not been defined in the ITA. The definition of "manufacturing" was first introduced in the ITA in 2009 *via* s. 46(f) of the Finance Act 2009 for the purposes of RA with effect from the YA 2009 and subsequent years of assessment. It is of the considered view that the definition does not apply to the applicant as the RA claim was first made in YA 2003. The applicant's existing right cannot be impaired or affected by the insertion of a new definition and the definition of manufacturing pursuant to para. 9 of Schedule 7A ITA is inapplicable to the applicant. In *Saujana Hotel Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2011] MSTC 30-022 the High Court had held:

> 35. In legislating and introducing Industrial building allowance *via* section 30 of the PIA Parliament would have certainly known it will take a taxpayer like the Applicant a period of 45 years to exhaust the allowance granted to it.
>
> 36. Pursuant to Schedule 3 of the ITA and the observation made in GASMSB, **it is only logical that the Appellant is entitled to claim Industrial building allowance until the total qualifying expenditure has been exhausted.** In addition, it is also recognized by the Malaysian Industrial Development Authority ("MlDA"), one of the authorities under MITl, that the Industrial building allowance is available until it is fully exhausted. (emphasis added)

[62] The Supreme Court in *National Land Finance Co-Operative Society Ltd v. Director General Of Inland Revenue* [1993] 4 CLJ 339 had emphasised that a taxing statute must be interpreted strictly and stated as follows:

> There is therefore a doubt whether the Legislature had intended to impair the existing right of the tax payer and inflict a detriment to it as it takes away a vested right under the ambiguity must be construed in favour of the tax payer as the said exemption from tax has not been removed by sufficiently clear words to achieve that purpose.

[63] At this juncture, it must be stated that it is of the considered view that when a taxpayer/company wants to apply for the special incentive relief under the ITA, it is up to the taxpayer/company to choose to claim in accordance with either Schedule 7A or Schedule 7B of the ITA. They are given the option to choose which special incentive relief they would want to opt for by the law. It is not for the respondent to dictate the taxpayer/company which incentive they should apply for.

[64] In adopting a holistic approach as to the applicant's business as whole and not in isolation and as to what electrical energy is, whether it is just a commodity or part of manufacture and production, this court is persuaded by the decisions of the Commonwealth countries cited in the above as this court shares the view that in generating electricity into a form that can be used by the customer, the generation and transformation must be considered to be part of the manufacture and production of electricity.

[65] Then, in scrutinising the functions of the disputed items claimed for RA under Schedule 7A as well as the particulars of project stated by the applicant in the RA form, it is of the considered view that the disputed items relate to manufacturing of electrical energy.

[66] In *Ketua Pengarah Hasil Dalam Negeri v. Tropiland Sdn Bhd* [2013] MSTC 30-054 the Court of Appeal had held:

> [18] *There is thus clearly a need to take a holistic approach in every case and look at the taxpayer's business in its entirety instead of taking particular facts in isolation.* The need to refrain from viewing the taxpayer's business in a fragmented fashion when determining whether an apparatus in a 'plant' was reinforced by the High Court of Australia in *W. Nevill & Co. Ltd. v. Federal Commissioner of Taxation* [1937] 56 CLR 290 where it was held: "In my opinion the answer to this contention is to be found in a recognition of the fact that it is necessary for income tax purposes, to look at a business as a whole set of operations directed towards producing income."
>
> (emphasis added)

[67] In balancing the need of the Government to realise the taxes and the need of the taxpayers to be protected against arbitrary or incorrect assessments, this court is minded by the *dicta* of Edgar Joseph Jr. SCJ in *Government Of Malaysia v. Jasanusa Sdn Bhd* [1995] 2 CLJ 701 that:

> Matters of this nature involve, *inter alia,* balancing the need of the Government to realise the taxes and the need of the taxpayer to be protected against arbitrary or incorrect assessments.
>
> ... The Court should also bear in mind the possibility of arbitrary or incorrect assessments, brought about by fallible officers who have to fulfil the collection of a certain publicly declared targeted amount of taxes and whose assessments, as a result, may be influenced by the target to be achieved rather than the correctness of the assessment.

Conclusion

[68] Premised on the foregoing, this court allowed the judicial review application by the applicant with costs.